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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Frank Peter Balistrieri, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of conviction entered by the United States District Court for the Southern District of Illinois on September 18, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 403 F.2d 472, and an unreported opinion of the trial court on a motion to suppress evidence are printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1968. A timely petition for rehearing was denied without opinion on December 31, 1968. By order of January 20, 1969, Justice Marshall extended the time for filing the petition for certiorari to and including February 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1(a). Whether, in the light of *United States* v. *Wade*, 388 U.S. 218 (1967), the government, to sustain its burden of demonstrating that its case against the accused is not the fruit of its admittedly illegal investigative activities, must be held to a standard higher than merely "substantial evidence."

(b). Whether evidence obtained by lawful methods, after its existence has been learned by unlawful methods, is tainted.

2(a). Whether, where the government has admitted investigating the accused by methods violating the law and his constitutional rights, there may lawfully be placed on the accused any burden of demonstrating that the evidence to be used against him was the fruit of the government's illegalities.

(b). Whether, to sustain its burden of demonstrating that its evidence is not tainted by admittedly illegal FBI bugging of the accused, his bookkeeper and his attorney, the government must disclose all FBI reports and memoranda containing information about the accused, especially when the FBI has destroyed the recordings of the bugged conversations and, in large part, has either destroyed or not kept the customary "logs" of its buggings.

3. Whether, where the government admits that the FBI maintained an illegal bug for almost six months in the office of the attorney who was representing the accused in the administrative stages at his tax case and later became one of accused's attorneys of record in his prosecution for tax evasion, the prosecution should be dismissed.

4. Whether, in a prosecution for income tax evasion, based on the net worth theory, the government may use as the "likely source" of the allegedly unreported income those corporations which the taxpayer disclosed on his return as the source of his reported income, without proof that those corporations were capable of producing and the taxpayer was capable of obtaining from them the additional income.

5. Whether, when the prosecutor attempts to impeach an important defense witness, as to whom he has no knowledge of any criminal record, by asking, first, whether the witness had ever been arrested and, then, whether he had ever been convicted of a felony, the accused is entitled to grant of a mistrial notwithstanding the court's instruction to the jury to disregard the questions.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Introduction

Petitioner was convicted by a jury of two counts of income tax evasion (for the years 1959 and 1960) in violation of 26 U.S.C. § 7201 and was sentenced to concurrent two-year prison terms and fines totalling $10,000. The indictment had also charged petitioner, together with his bookkeeper, Jennie Alioto, with conspiring to obstruct the lawful functions of the Internal Revenue Service (hereinafter "IRS") in violation of 18 U.S.C. § 371. Because the conspiracy count was tainted by illegal evidence, the court compelled the government to elect to proceed only on the two tax evasion counts. (E. 72)[1]

The Investigation

In September 1960, with an investigation of petitioner by the Federal Bureau of Investigation (hereinafter "FBI") already underway, the IRS began to investigate his tax affairs. (E. 34, A. 152) From that date, up to and even after the indictment on January 6, 1965, parallel and cooperative investigations were conducted by both agencies, coordinated by the Organized Crime Division of the Department of Justice. (E. 136-38, A. 152-53)

In its search for evidence to use against the petitioner, the government used various techniques, ranging from invasions of privacy to criminal trespass:

(1) From February 15, 1961, to April 11, 1962, the Post Office Department at the request of the IRS main-

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[1] The record references are cited to the printed appendixes submitted to the Court of Appeals. E. refers to Defendant's Exhibit of Excerpts from the Transcript Relating to Electronic Eavesdropping. A. refers to the Defendant's Appendix. G.A. refers to the Government's Appendix.

tained a mail cover of the petitioner and many other persons and companies believed to be connected with him. Reports of the mail cover were transmitted by IRS to the FBI. (E. 152-56)

(2) The FBI and IRS spied on Jennie Alioto's office apartment through a peep-hole in the door of a room across the hall. (E. 65, E. 148-49)

(3) The FBI broke into Miss Alioto's apartment office on or about October 3, 1961, and installed a bugging device which they maintained until about June 8, 1962, monitoring it from another apartment in the same building. (E. 71, E. 216-217)

(4) From March 9, 1964, to June 3, 1965, six months after the indictment, the FBI maintained a bug in the wall of petitioner's office. This bug, also installed by trespass, was connected through the cooperation of the Wisconsin Telephone Company to the FBI office, where it was monitored at leisure.[2] (E. 217-18)

(5) From April 22, 1963, until October 2, 1963, the FBI maintained a bug in the law office of Dominic Frinzi, who, as the government knew, was then petitioner's tax counsel and who was later to be attorney of record in this case. That bug as well was linked to the FBI office by telephone. (E. 188-89)

(6) During the period they were bugging Miss Alioto, FBI agents surreptitiously broke into her apartment and photographed a private file belonging to petitioner. (E. 66-68)

(7) On September 26, 1962, the IRS, pursuant to a warrant later declared invalid, searched Miss Alioto's

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[2] This bug overheard one of petitioner's phone conversations with his attorney, Maurice J. Walsh, about his tax matters. (Defendant Exhibit 3, A258)

apartment and seized voluminous records of petitioner and corporations in which he had an interest. In the week of April 7, 1963, the United States District Court for the Eastern District of Wisconsin held a hearing on the legality of that search and, on April 18, 1963, held the warrant illegal and ordered return of the seized documents. *Alioto* v. *United States,* 216 F.Supp. 48 (E.D. Wisc. 1963) Apparently in anticipation of such an order, the IRS agents had begun to digest and photograph the seized materials, and they continued that project even after the hearing. (E. 149-50) When the seized materials were ordered returned, IRS, on the advice of the Organized Crime Division of the Department of Justice, retained the digests and copies it had made. (E. 150) It did not disclose to the court what it had done.

The Trial

The case, transferred at petitioner's request from the Eastern District of Wisconsin to the Southern District of Illinois, came to trial on October 17, 1966.

About a week earlier, petitioner, having discovered the bug in his office, had served on the prosecution a copy of a motion to suppress the fruits of electronic eavesdropping. At the commencement of the trial, the government admitted that petitioner had indeed been subjected to electronic surveillance and said it had intended to disclose the fact quite apart from petitioner's motion. The Department of Justice, according to government counsel, was informed by the FBI on September 29, 1966, that there had been bugging. Thereafter, the Department requested details and was supplied with information and materials relating to the three buggings—Alioto, Balistrieri and Frinzi.

The material in question purported to be all that the FBI had. (E. 7-27)

The information and material as to the Alioto and Balistrieri bugs were given to the defense. As to the Frinzi bug, the prosecution informed the defense only that there had been a third bug, but the identity of the victim and the related materials were offered only for the court's *in camera* inspection. (E. 13) The court, after inspecting the material, sealed it and overruled defense demands for disclosure. (E. 23) Much later in the trial, after defense demands for disclosure of bugging against counsel, the prosecution unsealed the Frinzi material. (E. 188-89)

The government's basis for originally withholding the Frinzi material from the defense was that "the defendant's name is merely mentioned on two occasions. We don't believe it has anything to do with the case . . . ." (E. 10). When the Frinzi bugging was attacked on appeal as a conscious interference with petitioner's constitutional right to counsel, the government argued that the bugging was directed not against petitioner, but against Frinzi, in search of information about Frinzi's suspected hoodlum connections. Government Brief, p. 27. The Seventh Circuit, upholding the government's contention, said:

> We find nothing in the record supporting the allegation that the purpose of conducting the surveillance was to interfere with defendant's right to counsel . . . . App. 9a.

The following facts, notwithstanding the failure of the court below to find them, are undeniably in the record:

(1) The Frinzi bugging was disclosed by the FBI to the Attorney General as one of the details of the

earlier-revealed information "that Mr. Balistrieri had been the subject of an electronic surveillance." (E. 8).

(2) Taking on faith the FBI's explanation that they aimed the Frinzi bugging at Frinzi's "Milwaukee hoodlum" connections, petitioner was considered by the government to be included within that description. The very memorandum in which the FBI made its explanation, for example, is captioned "Frank Peter Balistrieri, Anti-Racketeering." (G.A. 276).

(3) Although government counsel strove mightily to persuade both courts below (E. 189 and Government Brief p. 27, n. 6) that they had not known until late in the trial that Frinzi was one of petitioner's counsel of record in this case, the FBI memorandum of explanation, dated the very day the trial opened, belies their contention. (G.A. 276-77) The memorandum, as first revealed to the defense, stated the FBI had not bugged four named defense attorneys (omitting Frinzi). Then there was an excision, followed by the statement that there had been no bugging "on any other individuals known to be engaged as attorneys in the Balistrieri litigation." (G.A. 277) In revealing the memorandum to the defense, the prosecution represented it as indicating "that there had been no electronic surveillance on the gentlemen who are acting as attorneys for Mr. Balistrieri." (G.A. 50). The excised material stated that the FBI had bugged Frinzi. Without excision, therefore, the memorandum can be paraphrased as follows: "We did not bug counsel A, B, C and D; we did bug counsel Frinzi; we did not bug anyone else we know to be counsel for the defense." Not even the most heedless reader of the memorandum could have failed to know that the FBI was admitting that it had bugged one of the defense counsel.

(4) Quite apart from the fact that Frinzi was one of petitioner's counsel of record in this criminal case, the government necessarily knew, from the records of the IRS personnel who were preparing the prosecution, that, during the time Frinzi was being bugged, he was working as tax counsel with petitioner and members of petitioner's family in preparing defensive positions as to the very financial transactions about which the government was building its case.[3] (A. 67-76).

The government was compelled to admit that the intensive investigation of petitioner was riddled with illegality. There was thus no difficulty in ordering suppression of all illegally obtained evidence. As always in such cases, however, the prosecution maintained that the evidence it proposed to present against petitioner was unaffected by the illegalities. (E. 68) The government undertook to prove the purity of its evidence through the testimony of a number of IRS agents that they had developed the evidence independently and had neither seen nor heard a hint of tainted material. (E. 81) Predictably, the agents who saw no evil and heard no evil also spoke no evil. Although there was considerable collaboration and interchange of information between those miscreant government agents who had contaminated the case and

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[3] Frinzi's affidavit, in support of petitioner's motion for judgment n.o.v. or for a new trial, asserted, without contradiction by the government, that, during the period of the bugging: (1) he had accompanied members of petitioner's family to the office of IRS in response to administrative summonses; (2) he had conferred with those persons in the bugged premises both before and after their sessions with IRS; (3) he had conferred about petitioner's case in his bugged office with one of petitioner's other counsel on four occasions; (4) he had conferred there with petitioner on six stated occasions and others which he could not specify; and (5) he had talked to petitioner by telephone from his bugged office.

those whose testimony was offered to de-contaminate it, (E. 34, 53-55, 59, 63, 122-23, 136-38, A. 152-53) the latter steadfastly denied that the former had ever conveyed to them any of the fruits of illegality. On that showing the government rested its demonstration of purity.

The defense, while disclaiming any burden on the taint issue, (E. 88-89, 159) undertook to examine one of the guilty FBI agents. (E. 33-68) That agent, who had since become a magistrate, invoked the Fifth Amendment as to some of his official misconduct, but said enough to cast doubt on the purity of the government's evidence on the conspiracy count, occasioning the court's order that the government elect to try only the tax evasion counts. (E. 72) As for the two tax evasion counts, the court held that the government's showing of purity was sufficient. The Court of Appeals sustained that holding, saying:

> Therefore, although some causal connection could, by sophisticated argument, be shown between the electronic eavesdropping and the Government's proof, we find that "such connection has become so attenuated" in the instant case as to dissipate the [illegible] App. 8a.

The "purified" government case was a net worth-expenditures demonstration of tax evasion. The starting point was a statement filed with the Wisconsin Department of Taxation showing petitioner's net worth as of December 31, 1953. From this point the government made a year-by-year analysis of his receipts and expenditures to reach an opening net worth for 1959, the first prosecution year. As the "likely source" of taxable income, the government introduced evidence

linking petitioner to Midwest Scrap Metal Company, a company from which he had reported no income. Since Midwest could not have yielded enough income to account for the amounts charged in the two taxable years,[4] the government relied for the balance upon several corporations which petitioner had named in his tax returns as sources of his income.

Throughout the trial, petitioner objected to various items of evidence as direct or indirect fruits of one or another of the admitted investigative illegalities. The government maintained that each item of evidence had a source independent of the illegal activities, usually the mail cover which the trial court had held to be legal. For example, petitioner objected to the Midwest Scrap Metal evidence as a product of the September 26, 1962, illegal search of Miss Alioto's apartment. The government pointed to the July and August 1961 mail cover reports as sources of two leads to the evidence. Despite the fact that the purported mail cover leads lay undeveloped for fourteen months until the illegal search produced information about Midwest, the trial court sustained the government's position that the Midwest materials were obtained independently of the illegal seizure. App. 18a-23a. The Court of Appeals approved that ruling. App. 5a.

With respect to the corporations other than Midwest relied on by the government as a "likely source" of unreported income—from all of which, as above stated, petitioner had reported income in the taxable years—the record is barren of any evidence as to their capa-

[4] The amounts of unreported income charged for 1959 and 1960 were $22,681.38 and $31,648.90 respectively. (G A. 196-97). Midwest's gross profits for those years were only $3,071.45 and $2,163.05, respectively. (G.A. 198, 202).

bility of producing for petitioner any more income than he had already reported. The court below, pointing out that there was evidence that petitioner operated and was president of those corporations, approved their use as the "likely source" of unreported income. App. 16a.

To account for the purported net worth increases shown by the prosecution, petitioner called a series of witnesses to testify that certain receipts were loans to him and that certain expenditures had been made by other persons. The first of these witnesses, Harold Klein, testified that he had lent petitioner $5,000 in 1960. The full cross-examination by the prosecutor was as follows:

> By MR. GIMBEL:
>
> Q. Was the money ever repaid, Mr. Klein?
> A. No, sir.
> Q. Mr. Klein, have you ever been arrested?
> MR. WALSH: I object to that, Your Honor, Counsel knows that that's not impeaching, and I move for a mistrial.
> THE COURT: Up here, gentlemen.
> MR. WALSH: Incidentally, I've been arrested for speeding.
>
> (Discussion off the record, at the bench, outside the hearing of the jury.)
>
> THE COURT: Objection will be sustained.
> MR. WALSH: And may the jury be instructed—?
> THE COURT: Jury will be instructed to disregard it.
> MR. WALSH: I made a motion—.
> THE COURT: Motion will be denied. I want no more questions like that asked by the U.S. Attorney, you know the rules.

MR. GIMBEL: Q. Have you ever been convicted of a felony?

MR. WALSH: I object to that.

THE COURT: That will be stricken and the jury will be directed to disregard it.

MR. WALSH: Your Honor, based on Counsel's statement that he did not know, I move for a mistrial, that is error unless he's prepared to prove such a matter. Now, this is serious, he knows—.

THE COURT: Well, the objection—the objection will be sustained and the jury is instructed to disregard it, and the United States Attorney is instructed to ask no more questions like that. Motion will be denied.

MR. GIMBEL: I have no further questions. (A. 178-79)

The government conceded below that this cross-examination was improper but contended that it was not prejudicial. The Court of Appeals sustained that contention. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

1. The Standard of Proof in Determining Taint

The standard which the government must meet to demonstrate that its evidence is not a product of a violation of accused's constitutional rights has divided the circuits. See, *United States* v. *Schipani,* 289 F. Supp. 43, 54-55 (E.D.N.Y. 1968), and cases there cited. Courts considering a variety of constitutional violations have proliferated a variety of conflicting standards: a preponderance of the evidence,[5] clear and con-

[5] *Clifton* v. *United States,* 125 U.S. App. D.C. 257, 371 F.2d 354, 358-59 (1966), *cert. denied,* 386 U.S. 995 (1967) (confession), overruled, *Pea* v. *United States,* — U.S. App. D.C. —, 397 F.2d 627, 637 (1968) (on rehearing, en banc) (confession).

vincing evidence,[6] and proof beyond a reasonable doubt.[7] This Court, at least as to constitutionally defective lineups, has stated that the government must "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *United States* v. *Wade,* 388 U.S. 218, 240 (1967). But no court to date has suggested, as does the court below by adopting "substantial evidence" as the standard, that evidence just more than a mere scintilla suffices.

Substantial evidence has a longstanding, well accepted definition:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 229 (1939).

It represents the quantum of evidence which is necessary to survive a motion for directed verdict. *Id.* at 300. As such it is a less stringent standard than mere "preponderance of the evidence" and far less stringent than "clear and convincing evidence" or "proof beyond a reasonable doubt."[8]

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[6] *Fisher* v. *United States,* 382 F.2d 31, 34 (5th Cir. 1967) (confession). See, *United States* v. *Wade,* 388 U.S. 218, 240 (1967) (lineups).

[7] *Pea* v. *United States, supra* note 5, at 633 n. 7, (and authorities cited therein); *Mullins* v. *United States,* 382 F.2d 258 (4th Cir. 1967); *United States* v. *Inman,* 352 F.2d 954 (4th Cir. 1965); *United States* v. *Schipani,* 289 F. Supp. 43 (E.D.N.Y. 1968); *United States* v. *Taglianetti,* 274 F. Supp. 220, 226 (D.R.I. 1967) (electronic surveillance), *aff'd,* 308 F.2d 558 (1 Cir. 1968).

[8] See, e.g., McCormick, Evidence, 676-85 (1954).

These are not merely semantic differences. The question of suppression in many cases depends on which criterion is applied. See, *United States* v. *Schipani, supra, at* 55. The chasm between substantial evidence and clear and convincing evidence is wide. As this case illustrates, the substantial evidence standard is grossly inadequate and should not be allowed to determine either this or any future suppression decision.

An important part of the prosecution's case was the establishment of a business relationship between Midwest Scrap Metal Company and Altex Corporation. In its illegal search on September 26, 1962, IRS seized documents directly revealing the Midwest-Altex connection. In the succeeding months IRS copied and digested the illegally seized documents, and on December 19, 1962, an IRS agent contacted Altex about its relation to Midwest. (E. 185). To decontaminate its case, the prosecution showed that IRS had learned from mail cover reports in July and August 1961, over a year before the illegal seizure, that a letter had been addressed to Midwest at the address of a concern operated by petitioner and that a letter had been sent by Altex to another of petitioner's business addresses. (E. 110-11) Those mail cover reports, unlike the later illegal seizure, showed no relation between Midwest and Altex. (E. 129-30) At most they could have provided starting points for an investigation which might have disclosed such a relation. One of the IRS agents who had been involved in both the legal and illegal facets of the investigation testified that the December 1962 approach to Altex, through which IRS developed the evidence, was made in pursuit of the sixteen-month-old legal mail cover "leads," not as a result of the rather precise disclosures of the illegally seized documents

which IRS had just finished digesting and copies of which, despite the court's return order, it considered valuable enough to keep. Another agent, testifying more realistically if not more frankly, said:

> From the date of the seizure to the date of the return these photographs were thoroughly examined by various members of the group and information was absorbed from them and probably retained, the information was retained by us, in setting up the final net worth statement we have here, we did not use any of the documents, as such in the preparation of this net worth statement, *however, we cannot wipe our minds out with some of the information that we did see.* A. 150-151 (Emphasis added.)

Although the government could not show that the purportedly "independent" exploitation of the two mail cover leads began before the illegal search and seizure, the court below said:

> *It is reasonable to conclude* that these two leads were logically tied together by the revenue agents, *before* the searches took place, to link Altex with Midwest and thus provide an important step in the investigation. Therefore, although the evidence obtained in the illegal searches would have led to the same link between Altex and Midwest which in turn led to the other evidence, some of which was admitted into evidence at trial, the initial lead was obtained independently of and prior to the search. (Emphasis added). App. 5a.

And the court held that the prosecution had carried its decontamination burden by "substantial evidence." App. 8a.

As an alternative to its unsupported conclusion that the government's legal burst of investigative energy came before it had obtained the illegal evidence, the

court, citing a comment by Judge Hand in the third round of *Nardone,*[9] took the position that legally obtained evidence is not tainted by the fact that the search for it was precipitated by illegally obtained information. That position is in square conflict with Judge Weinstein's opinion in *United States* v. *Schipani, supra* at 61-63.

In the unsettled state of judicial opinion on the quantum of the government's burden of decontamination, we submit that the writ here sought should be granted to correct the demonstrably insufficient standard approved below and to preserve the integrity of this Court's opinion in *United States* v. *Wade.*

2. The Burden of Proceeding in Decontamination of Evidence

The conclusion below "that the Government met its burden" of decontamination flowed from an assumption that, in some measure, the accused bore a burden of affirmatively demonstrating taint. The court held:

> The trial judge gave defendant the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree, and we conclude that the decision of the district court that the Government met its burden of proving its evidence free from taint is supported by substantial evidence and not erroneous. App. 8a.

In *Nardone* v. *United States,* 308 U.S. 338 (1939), upon which the court below relied, this Court articulated the burden of proceeding in determining whether evidence is a product of illegality:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfac-

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[9] *United States* v. *Nardone,* 127 F.2d 521, 523 (2d. Cir.), *cert. denied,* 316 U.S. 698 (1942).

> tion that wiretapping was unlawfully employed. Once that is established—as was plainly done here —the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin. *Id.* at 341.

It is possible to read this language as did the court below, to impose on the accused not only the burden of establishing the initial illegality, but also a share of the burden of establishing that the evidence to be proffered against him is tainted. Since *Nardone,* however, the trend of decisions has been to relieve the accused of any burden of demonstrating taint. Once the illegality is established, the government must prove the purity of its case. See, Pitler, "The Fruit of the Poisonous Tree" Revisited and Shephardized, 56 Cal. L.Rev. 579, 647-49 (1968).

Thus, in *United States* v. *Goldstein,* 120 F.2d 485 (2d Cir. 1941), *aff'd,* 316 U.S. 114 (1942), Judge Learned Hand stated that:

> . . . this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled. *Id.* at 488.

In *United States* v. *Coplon,* 185 F.2d 629, 636 (2d Cir. 1950), Judge Hand restated this position. In *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79

n. 18 (1964), this Court allocated the burden on the taint issue to the prosecution alone. Mr. Justice White, concurring in the Court's view, cited with approval Judge Hand's opinions in both *Goldstein* and *Coplon, supra.* 378 U.S. at 103. Finally, in *United States* v. *Wade,* 388 U.S. 218, 240 n. 31 (1967), the following language from Mr. Justice Murphy's dissent in *Goldstein* v. *United States,* 316 U.S. 114, 124, n. 1, was cited with approval:

> [A]fter an accused sustains the initial burden, imposed by *Nardone* v. *United States,* 308 U.S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin.

The allocation to petitioner of even a share of the taint burden was erroneous. When the illegal governmental conduct is electronic eavesdropping, as here, in large part it was, the prejudicial effect of an erroneous allocation of burden is magnified. As Judge Hand said in *Goldstein,*

> To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i.e., "taps" and some use of them, it should do the rest. 120 F.2d at 488.

There was admitted cooperation between the FBI, which did the bugging, and the IRS, which purportedly prepared the evidence. In addition to this horizontal cross-fertilization, information flowed in vertical chan-

nels between the agents and the national IRS and FBI offices and the Organized Crime Division of the Department of Justice. (E. 136-38, A. 152-53) The tape recordings of the intercepted conversations are not available to show what was overhead, for the FBI's practice is to destroy them by re-use. (E. 42, 107-8) Nor do we have here the purportedly full "logs" customarily prepared in bugging operations. On one of the bugs here, no logs at all were produced and on another only the sketchiest of summaries. (E. 11)

Given all these facts and the further fact that it was the FBI's practice to cloak the nature of bugged information by attributing it to a "confidential" source, (E. 221-26) how probative, on the taint issue, is the testimony of a few IRS agents that they did their jobs in blissful ignorance of the bugging? Even if the IRS agents who prepared the government's evidence were completely unaware of the FBI's illegal bugging and truly believed that the evidence they developed was untainted by it, their belief is irrelevant to the extent that unconsciously they may have used the fruits of the illegality. We submit that the government cannot possibly sustain its burden without charting the flow of the illegal evidence to assure the court that it has not polluted the channels of the independent source. To the extent that, by destroying or failing to preserve records, the FBI has made it impossible to prepare such a chart, the government should reveal every FBI report or memorandum transmitting to any person or agency any information about the accused or about any persons or facts directly or indirectly related to him and show, thereby, if it can, that its case has not been polluted. Anything less, we submit, is insufficient and reduces the evidentiary hearing to a cruel hoax.

Right to Counsel

Governmental intrusions into the confidentiality of an accused's relationship with his attorney clearly violates the due process clause of the Fifth Amendment and the right to counsel clause of the Sixth. *Caldwell* v. *United States,* 92 U.S.App.D.C. 355, 205 F.2d 879 (1953); *Coplon* v. *United States,* 89 U.S.App.D.C. 103, 191 F.2d 749 (1951); *State* v. *Cory,* 62 Wash. 2d 371, 382 P.2d 1019 (1963). See *Hoffa* v. *United States,* 385 U.S. 293, 306 (1966). Whether this intrusion is by an informer or by electronic eavesdropping, the effect is the same: the destruction of the cornerstone of the fair administration of criminal justice, the unique relationship between attorney and client. Such is the sanctity of this relationship that this Court has ordered new trials, rather than merely remanding for post-trial taint determinations, in cases where the government has incidentally overheard conversations between an accused and his counsel in buggings not intended for that purpose. *Black* v. *United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967). In the *O'Brien* case, the conversation incidentally picked up in the bugging of a commercial establishment was merely a discussion about bail limitations.

Where, as here, the government directly bugs an attorney's office in order to obtain ammunition for a case it is preparing against his clients the abuse of fundamental rights is so flagrant that dismissal of the prosecution is the only appropriate remedy. This direct intrusion into the lawyer's premises distinguishes this bugging from others which have reached this Court. The Supreme Court of Washington recently considered en banc a nearly identical question. *State* v. *Cory, supra.* There, sheriff's deputies had overheard a con-

versation between the defendant and his attorney by bugging a room in the jail reserved for attorney's interviews with their clients. The court held:

> It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendand and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside and the charges dismissed. 382 P.2d at 1023.

Dismissal is a strong sanction; but nothing less can protect the integrity of our system of justice against such callous official misbehavior as the direct bugging of an attorney's office to ferret out his client's secrets. To relegate petitioner in such a case to the process of determining the extent to which the bugging has tainted the evidence is, as shown by this record, a futile gesture. The documents necessary to show what was overheard are conspicuously absent. The miscreant officers say they overheard no secrets. The accused and his lawyer, the victims of the intrusion, even if it were proper to impose the burden on them, could only testify to what there was to overhear, but could not possibly prove it was actually overheard. Moreover, insofar as the policy of this Court requires deterrence of official misconduct, a taint determination proceeding is an ineffective remedy, because the subtleties of projudice inherent in official intrusion into the lawyer's sanctuary are incalculable and,

> if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will

> have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy. *State* v. *Cory, supra* at 1023.

4. "Likely Source" of Net Worth Increase

In *Holland* v. *United States,* 348 U.S. 121 (1954), this Court affirmed a conviction of tax evasion, based on the net worth theory, in which the prosecution had proven not only an increase in net worth, but also that the business which the taxpayer had reported as the source of his income was "capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases." *Id.* at 138. In *Holland,* as here, there were issues of fact as to whether the apparent net worth increase constituted income taxable during the indictment year. The taxpayer, accordingly, contended that the prosecution had made no prima facie case because it had failed to "negative all the possible nontaxable sources of the alleged net worth increases. . . ." *Id.* at 137. The Court, while agreeing that a net worth increase, without more, was not proof of "currently taxable income," said:

> But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. *Id.* at 138.

The instant case was prosecuted under this leg of the *Holland* holding. The prosecution, finding it impossible "to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant," *ibid.,* asked the jury to find that the in-

creased net worth was taxable income the "likely source" of which was the corporations named by petitioner in his returns as the source of his reported income. (G.A. 246-47) Consonant with the prosecution's theory, the court instructed the jury:

> The Government need not negative every conceivable source of nontaxable funds. It is sufficient if the Government proves a likely source of taxable income to account for any increase in the defendant's net worth. (A. 242)

The significant difference from *Holland,* however, is that here the prosecution did not even attempt to prove that the corporations were "capable of producing" the additional income. Moreover, there was nothing to suggest here that the corporate sources relied on were, like those in *Holland's* companion cases, enterprises susceptible to financial irregularities.[10] Nor was there a suggestion that the business of these corporations was, like gambling, "an occupation with indeterminate possibilities that might well have brought in more than [the amounts] with which [the defendant] was charged. . . ." *United States* v. *Costello*, 221 F.2d 668, 672 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), cited with approval by the court below in *United States* v. *Mackey*, 345 F.2d 499, 507 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965).

So far as disclosed by the record, the corporations here relied on are enterprises duly licensed and sub-

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[10] *E.g., Smith* v. *United States*, 348 U.S. 147 (1954) (a racing news service which kept no records); *United States* v. *Calderon*, 348 U.S. 160 (1954) (a coin-machine business with inadequate records). See also, *United States* v. *Johnson*, 319 U.S. 503 (1943), involving what this Court in *Holland*, described as ownership "of a vast and elaborately concealed network of gambling houses upon which [the defendant] declared no income . . ." 348 U.S. at 126.

ject to the same degree of governmental regulation or supervision as all other corporations, including, presumably, periodic audits by IRS agents. Indeed, in view of the intensive investigation of petitioner's tax affairs, the Court may safely assume that, since he reported income from those corporations, the government has thoroughly investigated them and has been unable to find that they could possibly have produced any more income than he reported. Nor is there any evidence that the corporations' business methods were such as to have provided petitioner an opportunity to siphon out undetectable income. Inherent in *Holland's* "likely source" definition is that the jury be capable of "reasonably" finding that the net worth increase came from that source. On this record, the prosecution asked the jury, in effect, to assume a fact which it could not possibly "reasonably" find from the evidence.

The court below upheld the "likely source" showing on the following basis:

> Defendant's connection with the companies mentioned having been shown, the prosecution was allowed to argue the possibility of these companies as a possible source of income. App. 15a-16a.

The effect of this holding, is that every owner or operator of a legitimate business who is charged with failing to report a taxable net worth increase can be convicted on a theory that he had unreported income from that business, even though (1) the prosecution has not negatived the possibility that the increase may be nontaxable, (2) the taxpayer has disclosed his business as the source of his reported income, and (3) the business, although beyond reproach in its operations and record-keeping, cannot be shown to have been capable

of producing more income than the taxpayer reported. The meticulously balanced structure of proof required by *Holland* would thus be reduced to a shambles.

With the ever increasing use of the net worth theory "in run-of-the-mine cases," *Holland* v. *United States,* 348 U.S. at 126, the impact of so erroneous a holding pressingly demands this Court's correction.

5. Improper Impeachment

The grossly improper cross-examination of the defense witness, Klein, amounted, in the circumstances of this case, to a deprivation of petitioner's constitutional right to a fair trial. Having no other basis for impeaching the witness and having no information to support a criminality impeachment, the prosecutor first asked whether the witness had ever been arrested. He must have known his question was objectionable. He obviously bargained for the effect of the question upon the jury, being willing to pay the insignificant price of an instruction to the jury to disregard it.[11]

When the prosecutor next asked whether the witness had ever been convicted of a felony, having just admitted at the bench that he had absolutely no factual basis for the question, the prosecutor put his misconduct beyond the bounds of any permissible judicial tolerance. The denial of a mistrial at that point, we submit, was impermissible error. This Court, in the exercise of its supervisory power over the administration of federal justice if not for constitutional reasons,

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[11] Logic would require the grant of a mistrial at that point. The trial court's refusal to grant a mistrial after that question was not surprising, however, for the exigencies of the litigative process seem often to induce a degree of judicial tolerance of prosecutorial impropriety.

should take this opportunity to announce to federal prosecutors and courts that such calculated misconduct as this will not be tolerated.

To call this misconduct harmless not only encourages its repetition in other cases, but also ignores the realities of this case. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) (Justice Jackson, concurring), cited with approval, *Jackson* v. *Denno,* 378 U.S. 368, 388 n. 15 (1964) and *Bruton* v. *United States,* 391 U.S. 123, 129 (1968). It has been observed that cautionary instructions may even compound the prejudice. See, Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 753-755 (1959). The instruction given here almost certainly compounded the prejudice. After instructing the jury to disregard the improper question, the court, addressing the prosecutor, said: "I want no more questions like that asked by the U.S. Attorney, you know the rules." The jury could thus have concluded that some technical rule prevented it from learning that the witness was a felon unworthy of belief. The prosecutor thereby achieved even greater prejudice than he had bargained for in asking what he knew to be an objectionable question. Moreover, coming as it did, to the first of a series of witnesses who testified to the essence of the defense, this ostensibly inane, but illegitimately lethal cross-examination had an inevitable carry-over to the testimony of the other witnesses as well.

It is bad enough for the government to have a "windfall" of having the jury influenced by something

"which, as a matter of law, they should not consider but which they cannot put out of their minds." *Delli Paoli* v. *United States,* 352 U.S. 232, 248 (1957) (Justice Frankfurter, dissenting), cited with approval, *Jackson* v. *Denno,* 378 U.S. at 388, n. 15, and *Bruton* v. *United States,* 391 U.S. at 129. For the government to obtain such an advantage by *conscious design* is so much worse that this Court should avoid no opportunity to denounce it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Below

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK PETER BALISTRIERI, *Defendant-Appellant.*

No. 16639

United States Court of Appeals
Seventh Circuit

Nov. 7, 1968

Maurice J. Walsh, Carl M. Walsh, Chicago, Ill., for defendant-appellant; Dominic Frinzi, Milwaukee, Wis., of counsel.

James B. Brennan, U. S. Atty., Milwaukee, Wis., Mitchell Rogovin, Assist. Atty. Gen., Lee A. Jackson, Chief, Appellate Section, Richard B. Buhrman, Charles A. McNelis, Joseph M. Howard, Attys., Tax Division, Dept. of Justice, for plaintiff-appellee.

Before CASTLE, Chief Judge, KNOCH, Senior Circuit Judge, and FAIRCHILD, Circuit Judge.

CASTLE, Chief Judge.

Defendant appeals from his conviction on Counts II and III of a three-count indictment charging him with crimes against the revenue. Count I charged defendant and Jennie Alioto with conspiring to defraud the Government by impeding the lawful functions of the Internal Revenue Service in the assessment and collection of income taxes. Counts II and III charged defendant with income tax evasion for the years 1959 and 1960 by filing false and fraudulent tax returns, in violation of 26 U.S.C. § 7201.

Defendant and Miss Alioto, as co-defendants, filed motions for relief from prejudicial joinder, to dismiss Count I of the indictment, for a Bill of Particulars on Counts II

and III, and to suppress certain evidence, copies thereof, leads derived therefrom, and information secured thereby resulting from a search and seizure of Miss Alioto's apartment, conducted under an illegal search warrant.[1] After the Government filed a Bill of Particulars, defendant's motion for a further Bill of Particulars was denied. The trial was then transferred from the Eastern District of Wisconsin to the Southern District of Illinois, Southern Division, for trial as to Balistrieri only. An amended Bill of Particulars was filed shortly after the trial began, reducing the alleged beginning and end net worth figures, and thus the increases in the net worth of defendant and his wife during the relevant period by over 50%.

The Government's case was presented on the "net worth theory" whereby income for the relevant period is proved by showing that the defendant's net worth increased during the period. Thus, rather than having to prove the exact source or sources of the income, the defendant may be convicted of income tax evasion upon a showing that his net worth was unaccountably higher at the end than at the beginning of the tax period, and that the increase was not due to non-taxable sources, such as gifts, loans, or inheritance. In the instant case, the Government sought to bolster its net worth evidence with evidence of the likely sources of income.

Shortly before trial, defendant moved to suppress evidence obtained by electronic eavesdropping of defendant's office, after defendant had discovered a hidden microphone installed behind his office paneling. On the date when the

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[1] The search warrant obtained by the Internal Revenue Service was quashed in an action brought by Miss Alioto and the owners of the materials seized in the search. Alioto, et al. v. United States, 216 F. Supp. 48 (E.D. Wis. 1963). It also appears that the F.B.I., subsequent to the above search, unlawfully searched Miss Alioto's apartment and photographed certain documents belonging to defendant which were kept therein.

trial was scheduled to begin, the Government attorneys disclosed to the trial judge that the Government had three categories of F.B.I. reports obtained by admittedly illegal electronic eavesdropping. These reports concerned conversations overheard from devices placed in Miss Alioto's apartment from October 3, 1961 through June 8, 1962, in defendant's office from March 9, 1964 through June 3, 1965, and in the office of Dominic Frinzi, one of defendant's attorneys, from April 22, 1963 through October 2, 1963.

A substantial amount of testimony on this matter was heard by the court outside the presence of the jury. Defendant moved to dismiss the indictment on the ground that it was obtained through use of the information acquired by means of the illegal electronic eavesdropping, and this motion was denied. The court also denied motions for acquittal and motions that the eavesdropping information was inflammatory and deprived defendant of a fair grand jury. The court did, however, compel election by the Government to proceed on Counts II and III, and not on Count I, apparently in recognition of tainted evidence used in the first count.

Upon a verdict of guilty on Counts II and III, defendant was sentenced to two years imprisonment and fined $5000 on each count, the prison terms to run concurrently.

On appeal, defendant attacks the adequacy of the Government's evidence in meeting its burden of proving that the trial evidence was free from taint, the sufficiency of the evidence used to prove the "net worth theory" of tax evasion, the trial court's denial of defendant's motion for mistrial based upon the prosecutor's improper cross-examination of a witness, the trial court's refusal to answer the request of the jury for clarification of instructions, alleged improper arguments to the jury by the prosecutor, and an alleged breach of the attorney-client and accountant-client privilege.

I

The main contested issue concerns the Government's proof that its evidence was free from taint of the illegal searches and seizures and electronic eavesdropping.

During 1961, in the initial stages of the Internal Revenue Service investigation of defendant, the I.R.S. had, through the Postal Inspector in Milwaukee, requested that "mail covers" [2] be conducted on defendant's address and on various corporations which the I.R.S. believed were connected with defendant. Among these were the Downtowner (a tavern) and Gallagher's Steak House (a restaurant). On July 7, 1961, the I.R.S. received a mail cover report which disclosed that a first class letter addressed to Midwest Scrap Metal Company at the address of the Downtowner was delivered. The return address—Post Office Box 1205—was later determined to be the First Wisconsin National Bank of Milwaukee. On August 7, 1961, another mail cover report showed that a letter from Altex Corporation, a scrap metal dealer, was sent to Gallagher's Steak House. Lead cards were made and filed for each of these leads.

[1] Contrary to the findings made by the district court at the close of the testimony regarding the alleged tainted evidence, defendant contends that the evidence relating to Midwest Scrap Metal Company, upon which the Government relied as establishing a source of unreported income, was discovered only as the result of information extracted from the records illegally seized in Miss Alioto's apartment and as the result of the subsequent search by the F.B.I., and not by the independent leads obtained by the exploitation

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[2] A "mail cover" is conducted by furnishing the Government with the information appearing on the face of the envelope addressed to the particular address: i.e., addressee, postmark, name and address of sender (if it appears), and class of mail. The actual mail is delivered to the addressee and only the letter-carrier's notation reaches the Government agency which requests the mail cover.

of the information extracted from the mail covers and lead cards by the I.R.S. On all issues regarding the alleged tainted evidence, the Government conceded that it had the burden of proving that its evidence was free from taint.[3]

With respect to the Midwest Scrap Metal Company evidence, the Government sought to meet this burden by demonstrating that the lead was discovered independently of and prior to the searches, as the result of the mail covers conducted in the summer of 1961. In following up the mail cover leads, the Government contends that it was led to the Altex Corporation. From the records of Altex followed other leads and evidence regarding Midwest and its connection with defendant. We find that the district court did not err in holding that the Midwest leads were obtained independently of the searches. The two lead cards disclosed that the address of Midwest, a dealer in scrap metal, was the same as the address of a business in which defendant was known to have an interest (the Downtowner), and that Altex, a seller of scrap metal, sent a letter to another business in which defendant had an interest (Gallagher's). It is reasonable to conclude that these two leads were logically tied together by the revenue agents, before the searches took place, to link Altex with Midwest and thus provide an important step in the investigation. Therefore, although the evidence obtained in the illegal searches would have led to the same link between Altex and Midwest which in turn led to the other evidence, some of which was admitted into evidence at trial, the initial lead was obtained independently of and prior to the search.

In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920),

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[3] See United States v. Wade, 388 U.S. 218, 240, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 79, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964); United States v. Coplon, 185 F. 2d 629, 636 (2d Cir. 1950), cert. den. 342 U.S. 920, 72 S. Ct. 362, 96 L. Ed. 688.

Mr. Justice Holmes, speaking for the Court, stated the policy behind the Fourth Amendment:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it * * *." 251 U.S. at 392, 40 S.Ct. at 183.

In Wong Sun v. United States, 371 U.S. 471, 487-488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), the Supreme Court cogently held:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

[2] We hold that the evidence relating to Midwest was not "come at by exploitation" of the information obtained in the illegal searches and seizures, but "by means sufficiently distinguishable to be purged of the primary taint."

We reach the same conclusion regarding the evidence allegedly obtained by the illegal electronic eavesdropping. The Government met its burden in proving that its evidence was free from this taint by disclosing to the court and the defendant all information in the Government's

possession, including summaries of the tapes which had been erased in the ordinary course of re-use,[4] undestroyed tapes, and by making available the agents who participated in the eavesdropping. The district court ordered suppressed all the information obtained as the result of the electronic surveillances and the searches and seizures and all leads developed therefrom. Defendant contends, however, that the Government failed to meet its burden since it had destroyed the best evidence of what had been heard through erasure of the recordings on some of the tapes by their re-use. However, the Government tendered proof to the district court showing independent sources for the leads to each of the items of evidence introduced at trial. The trial judge displayed a high degree of prudence and deliberation in hearing extensive testimony from each side before concluding that the evidence offered by the Government was free from taint. We agree with his conclusion.

Mr. Justice Frankfurter, speaking for the Supreme Court in Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), stated the guidelines to be used by federal courts in determining issues of tainted evidence. After stating the quotation from *Silverthorne,* cited above by us, he said:

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." 308 U.S. at 341, 60 S.Ct. at 268.

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[4] The recent Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518, which requires all recordings made pursuant to it to be kept for ten years, has no application to the instant case in which the investigation took place prior to its passage.

Therefore, although some causal connection could, by sophisticated argument, be shown between the electronic eavesdropping and the Government's proof, we find that "such connection has become so attenuated" in the instant case as to dissipate the taint. The trial judge gave defendant the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree, and we conclude that the decision of the district court that the Government met its burden of proving its evidence free from taint is supported by substantial evidence and not erroneous.

Judge Learned Hand's comment in United States v. Nardone, 2 Cir., 127 F.2d 521, 523 (1942), cert. den. 316 U.S. 698, 62 S.Ct. 1296, 86 L.Ed. 1767 is particularly appropriate to the issues discussed above:

> "The question therefore comes down to this: whether a prosecution must show, not only that it has not used any information illicitly obtained, either as evidence, or as the means of procuring evidence; but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich of the statute [47 U.S.C. § 605] as so extreme an application of it would demand. On the last appeal the court made it abundantly clear that it did not contemplate a chase after will-o'-the-wisps. 'Tenuous claims' are not 'sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence.' The 'claims * * * must satisfy the trial court with their solidity.' We are not 'to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law.' [308 U.S. 338, 60 S.Ct. 268, 84 L.Ed. 307.] Such expressions indicate no

> disposition towards the refinements inevitable in deciding how far the illicit information may have encouraged and sustained the pursuit. We hold that, having proved to the satisfaction of the trial judge that the [electronic surveillance and searches and seizures] did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, * * *, the prosecution had purged itself of its unlawful conduct."

[3, 4] Defendant's contention that the eavesdropping evidence use to obtain Count I of the indictment was prejudicial as to him affords no basis for reversal since he was never prosecuted on the first count. An illegal search and seizure "does not serve to immunize" the defendant from prosecution. United States v. Ruffin, 389 F.2d 76, 79 (7th Cir. 1968); United States v. Hoffman, 385 F.2d 501, 503-504 (7th Cir. 1967).

[5] Defendant further contends that the eavesdropping conducted on the law office of Mr. Frinzi constituted an intentional interference by the Government with defendant's Sixth Amendment right to counsel. As with the other electronic eavesdropping, the Government proved its evidence was free from any taint as the result of this illegal surveillance was to interfere with defendant's right to more than speculation. We find nothing in the record supporting the allegation that the purpose of conducting the surveillance was to interference with defendant's right to counsel, nor does it appear that such right was infringed as the result of the Government's conduct.

Defendant also contends that the overhearing of his telephone conversation with Mr. Walsh, who represented the defendant both below and on appeal, was a purposeful denial of his right to counsel. Again, there appears in the record no indication that the Government obtained any evidence from the overhearing of this call, or that it interfered with defendant's right to counsel.

Defendant relies heavily on O'Brien v. United States, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967), in his Sixth Amendment claims. That case is quite distinguishable, however, in that, unlike the instant case, the eavesdropping was not disclosed until after the defendant's conviction. It was this fact which required reversal, since the *undisclosed* intrusion on the attorney-client relationship deprived defendant of his right to an adversary proceeding.

Defendant argues that, even though we hold that the above violations were sufficiently divorced from the evidence presented at trial to free them of taint, we should reverse in the exercise of our supervisory power "because the indictment was procured by use of inflammatory and grossly illegal evidence." The argument is based on the allegation that so many violations occurred in the investigation that the only remedy is reversal. Such is not the law.

[6] The decisions of the Supreme Court have consistently held that the remedy for illegally obtained evidence is suppression of such evidence and all leads derived therefrom.[5] This remedy was fully accorded to defendant by the district court, and we find no authority for the proposition that the defendant is further entitled to reversal, after the illegally obtained evidence was suppressed and the jury returned a verdict of conviction upon the other evidence which had been properly admitted.

II

The next general contention by defendant is that the evidence used to prove the net worth theory of tax evasion

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[5] E.g., Hoffa v. United States, 387 U.S. 231, 87 S. Ct. 1583, 18 L. Ed. 2d 733 (1967); United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Gilbert v. State of California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967); Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426 (1920).

was legally insufficient, and therefore that his motions for acquittal at the close of the Government's case and at the close of all the evidence should have been granted. Defendant cites Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), as the leading case on the "net worth mehod." That case held that this method of proving income tax deficiency "is so fraught with danger for the innocent, that the courts must closely scrutinize its use." 348 U.S. at 125, 75 S.Ct. at 130. The Court went on to say:

> "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. Universal Camera Corp. v. [National] Labor [Relations] Board, 340 U.S. 474, 489 [71 S.Ct. 456, 465, 95 L.Ed. 456]. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." 348 U.S. at 129, 75 S.Ct. at 132. Cf. United States v. Tolbert, 367 F.2d 778 (7th Cir. 1966).

With these words of the Supreme Court fully in mind, we nevertheless find no error below which would justify reversal. In dealing with this general contention, we find that careful scrutiny leads us to the conclusion that the Govern-

ment established a *prima facie* case against defendant, and that defendant's five-pronged attack on the Government's case is without merit.

[7] (1) Defendant first contends that the Government failed to show a solid net worth starting point. However, the starting point in defendant's net worth, as used by the Government and placed before the jury for its decision, was based upon a net worth statement which was signed by defendant and his wife and submitted to the Wisconsin Department of Taxation in 1954. This statement included cash on hand as of December 31, 1953, in the amount of $1000. The propriety of including this figure in the net worth starting point was upheld by this Court in United States v. Mackey, 345 F.2d 499, 506 (7th Cir. 1965), cert. den. 382 U.S. 824, 86 S.Ct. 54, 15 L.Ed.2d 69 where the Government's case did not have the advantage of a signed statement concerning the defendant's cash on hand.

Added to the amount claimed by the statement were certain visible assets belonging to defendant which had been disclosed by the Government's investigation, and which were not included in the statement.[6] After arriving at a net worth of $73,780.62 as of December 31, 1953, the Government traced defendant's net worth at the end of each year, through the prosecution years of 1959 and 1960, proving that defendant's reported income could not account for any increases in cash on hand significantly larger than the $1000 for which he was given credit. Certain accrued liabilities were properly eliminated in the Government's computations since defendant reported income on the cash basis. Thus, as the Government points out in its brief (at p. 33), "the gap between the starting point and the beginning of the first prosecution year, 1959, was bridged

[6] The largest item in this category included the stock of Tower Tavern, Inc., amounting to $31,062.67, which defendant claimed was bought in large part through a loan from his mother.

by carefully reconstructing appellant's net worth as of the end of each intervening year, adding non-deductible expenditures, and demonstrating that no additional cash on hand could have been accumulated from income reported in the intervening years."

(2) Defendant further argues that the Government failed to account for borrowings in arriving at its net worth figures. After carefully scrutinizing the record, however, we find that the loans were taken into account as liabilities and that defendant was given proper credit for them.

[8] (3) Defendant also attacks the propriety of including in his net worth as of December 31, 1959, $10,000 of cash on hand which had been deposited in the Marshall and Ilsley Bank in the name of Joseph Balistrieri or Frank Balisterieri, the defendant, on January 25, 1960. Joseph is defendant's son, who was a 19 year old minor and was claimed as a dependent by defendant, at the time the joint account was opened. The jury had ample grounds to believe that this money was in fact the defendant's since the Government proved that defendant controlled the account and withdrew a substantial amount from it on March 23, 1961. We therefore find that the evidence was sufficient to support such a conclusion.

[9, 10] (4) As a final attack on the denial of the motion for acquittal at the close of the Government's evidence, defendant contends that the prosecution failed to prove that the increases in net worth arose from taxable sources. However, the Government fulfilled its burden under the net worth method by: (a) giving defendant credit for all loans and for the proceeds of a life insurance policy received in 1958; (b) proving that the increases did not arise from gifts or inheritance; and proving three "likely" sources of taxable income—Hotel Roosevelt, Inc., Ben-Kay, Inc.,[7]

[7] There was evidence that defendant operated and served as president of these two companies.

and Midwest Scrap Metal Company. In Holland v. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 136, 99 L.Ed. 150 (1954), the Court held that "[i]ncreases in net worth, standing alone, cannot be assumed to be attributable to current taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." Cf. United States v. Mackey, 345 F.2d 499, 507 (7th Cir. 1965). The record, therefore, clearly indicates that the evidence presented to the jury was sufficient to support its verdict.

[11] (5) Defendant contends that the evidence produced by the defense conclusively rebutted the Government's case and required the granting of the motion for acquittal at the close of all the evidence. However, defendant's evidence consisted of testimony which the jury was justified in disbelieving as the result of their view of the demeanor of the witnesses and the cross-examination. Surely we can neither place ourselves in the unique position of the jury nor can we hold that they were compelled to believe the testimony of the defense witnesses they viewed, especially when much of the testimony conflicted with the evidence properly introduced by the Government.

[12] For the foregoing reasons, we hold that both motions for acquittal were properly denied.

III

[13] Defendant contends that the trial court's denial of his motion for mistrial based upon the prosecutor's improper cross-examination of defense witness Klein constitutes reversible error. The Government agrees that the two questions complained of constituted improper cross-examination, but contends that it was not prejudicial. Our review of the facts present in the instant case leads us to the same conclusion, that the error here was not prejudicial and does not call for reversal. First, the objections made

by defense counsel were sustained and the jury was explicitly instructed to disregard the questions.

[14] Moreover, the fact that witness Klein's testimony concerned only one of the indictment years and involved only a relatively small amount further demonstrates the lack of prejudicial effect of the improper cross-examination. It does not follow, as contended by the defendant, that improper impeachment of the first defense witness destroys the testimony of later witnesses called by the defense. To so hold, in view of the trial court's sustaining defendant's objections and the immediate instruction to disregard the improper questions, would involve an unwarranted assumption denying to the jury any degree of intelligence or discretion. Consequently, we do not view the denial of the motions for mistrial as erroneous.

IV

[15, 16] Defendant contends that the trial court committed error in overruling his objection and denying his motion for mistrial, based on the prosecutor's statement, in his summation to the jury, that there were possible sources of income other than Midwest Scrap Metal Company, and is naming a number of such possible sources with which defendant was connected. Defendant seems to ignore the fact that this statement by the prosecutor was made in reply to defense counsel's statement in his summation that Midwest was the only proven source and that that source was not nearly large enough to account for the unreported income shown by the Government's proof. Moreover, in a net worth case the Government need not prove a specific source of income to account for the increases in net worth, but need only show some "likely" source. Holland v. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 99 L.Ed. 150 (1954); Armstrong v. United States, 327 F.2d 189, 194 (9th Cir. 1964); United States v. Mackey, 345 F.2d 499, 506-507 (7th Cir. 1965). Defendant's connection with the com-

panies mentioned having been shown, the prosecution was allowed to argue the possibility of these companies as a possible source of income.

V

[17] Defendant further contends that the trial court committed error when it sent the jury back for further deliberations after the jury expressed some confusion regarding the instructions. We hold that no error was committed. When the jurors failed to make clear their problem, the trial judge advised them that if they had a problem they could submit it to the court in writing. Neither counsel objected, and defense counsel initiated the suggestion regarding the written inquiry. The jury then retired and later returned a verdict of guilty. To hold that these events compel reversal in this case would be entertaining the vaguest of speculations as to what was in the minds of the jurors. Rather than engage in such speculation himself, the judge refused to put words into the jurors' mouths and instead, upon suggestion of defense counsel, asked them to submit any problems they had in writing. Such conduct was correct and does not constitute error.

VI

[18-20] Defendant's last contention posits a violation of the attorney-client and accountant-client privilege in the trial court's allowing defendant's accountant to testify for the Government over defendant's objection. This contention is without merit for three reasons: (a) the accountant was not an attorney at law and thus no attorney-client privilege is involved; (b) the Illinois statute creating an accountant-client privilege — Chap. 110½, § 51, Ill.Rev. Stat.—may be invoked only by the accountant, not the client. Dorfman v. Rombs, 218 F.Supp. 905, 907 (N.D.Ill. 1963); and (c) in a federal criminal tax prosecution, federal law applies, Colton v. United States, 306 F.2d 633, 636 (2d

Cir. 1962), cert. den. 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499, and there is no accountant-client privilege in the federal system. Petition of Borden Co., 75 F.Supp. 857, 859-860 (N.D.Ill. 1948); United States v. Culver, 224 F.Supp. 419, 434 (D.Md. 1963) and cases cited. Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), cited by defendant, was a diversity case in which the Government was not a party, and is therefore inapplicable.

For the foregoing reasons, the judgment of conviction is affirmed.

Affirmed.

APPENDIX B

Trial Court's Order on Suppression of Evidence

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

Criminal No. 6602

UNITED STATES OF AMERICA, *Plaintiff*,

v.

FRANK PETER BALISTRIERI, *Defendant*.

Order

This cause has come on to be heard upon the following objections of defendant, Frank Peter Balistrieri, which objections move this Court to deny the admissibility of Government's Exhibits for identification numbered 311 to 323 inclusive, and move this Court to strike any testimony from Nila I. Jewett, former bookkeeper for Altex Corporation, concerning the relationship if any between Government's Exhibits for identification numbered 311 to 323 inclusive, and Government's Exhibit for Identification numbered 49. Defendant objects to the admissibility of this evidence on the grounds, among others, that all of the documents referred to above, or copies thereof, had been previously obtained by the Government through the execution of a search warrant subsequently held to be have been invalid. Defendant has also renewed his motion to suppress all property seized during the execution of the aforementioned warrant.

This Court, being fully advised in the premises, after careful consideration finds that the aforementioned warrant was executed on September 26, 1962.

This Court is fully cognizant of, and takes judicial notice of, the fact that on April 18, 1963, the Honorable Kenneth P. Grubb, Judge of the United States District Court for

the Eastern District of Wisconsin, ordered that all property seized in execution of the warrant be returned. Alioto v. United States, 216 F. Supp. 48 (E.D. Wisc. 1963). Judge Grubb did deny, without prejudice, defendant's request for suppression of the use of the seized material as evidence because there was no presently pending proceedings in which any of the seized property was being offered in evidence. This Court, for the purposes of this trial, has suppressed for use as evidence all property secured by the Government upon execution of the warrant on September 26, 1962, and ordered returned by Judge Grubb. (Tr. 21-22). This Court has also ordered suppressed certain evidence which the Government admits it obtained illegally. (Tr. 12-13, 20-21).

This Court has held several hearings in response to defendant's pretrial motion to suppress evidence and motions objecting to the admissibility of evidence on the ground that the evidence falls within this Court's suppression orders. Insofar as those hearings relate to defendant's objection to the admissibility of Government's Exhibits numbered 311 to 323 inclusive, and the testimony of Nila I. Jewett concerning the relationship if any between those Exhibits and Government's Exhibit numbered 49, this Court now finds the following facts:

1. On July 7, 1961, Special Agent Schwalbach of the Internal Revenue Service did receive, in connection with a then active investigation of the tax liability of Frank Peter Balistrieri, a mail cover report from Postal Inspector Cato which listed first class mail addressed to 340 W. Wells Street, Milwaukee, Wisconsin. (Tr. 126, 530; Gov't Papers No. 8, page 16 from the back). That report reflected a letter addressed to Midwest Scrap Metal, the sender's identification address as P.O. Box 1205 and a postmark date of 7/5/61.

2. Within a day or two thereafter, P.O. Box 1205 was determined to be the Post Office Box Number of the First

Wisconsin National Bank of Milwaukee, Milwaukee, Wisconsin, and an Internal Revenue Service lead card was prepared by Special Agent Jackson. (Tr. 126, 519, 521, 530; Govt. Motion Ex. 8, 8A).

3. On August 7, 1961, Special Agent Schwalbach received another mail cover report from Inspector Cato listing all first class mail addressed to 829 N. 3rd Street, Milwaukee, Wisconsin. (Tr. 536-542; Govt. Papers B, page 17 from the back). That report reflected a letter addressed to Gallaghers, the sender's identification as Altex Corporation, 1426 Arcadian Avenue, Waukesha, Wisconsin, and cancellation date of July 18, 1961.

4. Within a day or two thereafter, Special Agent Jackson made out a lead card for Altex Corporation. (Tr. 545; Gov't Motion Ex. 8B).

5. Information already known to the Internal Revenue Service indicated that Frank Balistrieri had an interest in Gallagher's Steak House, located at 829 N. 3rd St. Milwaukee, Wisconsin and that the business located at this address was also known as The Pub, Inc., Beachcomber, Milwaukee Tradewinds, Inc., and Gallaghers. (Tr. 133).

6. The search warrant executed on September 26, 1962, did not include in its description of property sought records of Midwest Scrap Metal Company. (Tr. 123; see also Alioto v. United States, 216 F. Supp. 48, 49, (E.D. Wisc., 1963). Records of Midwest were, however, seized in execution of the warrant including carbon copies of the original documents now identified as Government's Exhibits for Identification numbered 311 to 323 inclusive, the original cancelled checks of Government's Exhibit Numbered 49 and the original bank statements of Government's Exhibit Numbered 48. (Tr. 524; Group Exhibit No. 1).

7. Subsequent to September 26, 1962, and up to April 16, 1963, Revenue Service personnel inventoried all documents seized in the raid and made microfilm or photocopies

of substantially all documents seized. (Govt. Motion Ex. #7; Deft. Ex. 8; Group Ex. #1).

8. On December 19, 1962, Special Agent Jackson, extracted information from the lead card identified as Government Motion Exhibit Numbered 8A and contacted officers of Altex Corporation concerning Altex's business relationship with Midwest Scrap Metal Company. (Tr. 523, Gov't Motion Ex. #7, entry dated Dec. 19, 1962.) Government's Motion Exhibit Number 7 also contains an entry dated December 20, 1962, reflecting that Special Agent Jackson spent eight hours at Altex examining records.

9. On January 3, 1963, Special Agent Jackson, on the basis of information obtained from the Altex Corporation, contacted one Morey Cohen and secured from him records of A. Cohen and Sons Company, Milwaukee, Wisconsin, pertaining to the purchases of scrap metal by the company from the Midwest Scrap Metal Company. (Tr. 523; Gov't Motion Ex. #7, entry dated 1-3-63).

10. On January 11, 1963, records of A. Cohen and Sons were produced in response to Revenue Service summons issued by Special Agent Jackson on January 8, 1963. (Gov't. Motion Ex. #7).

11. Hearing on Motion to Return and Suppress property seized on September 26, 1962, was held by Judge Grubb during the week of April 7, 1963.

12. On April 18, 1963, or shortly thereafter, the Government, pursuant to the order of Judge Grubb entered on April 18, 1963, returned all property seized on September 26, 1962. Microfilm and photocopies of the seized documents were retained by the Government's agents (Tt. 185-186). They were turned over to defense counsel on October 25, 1966. (Tr. 110-111).

13. An examination of Government's Exhibits for Identification numbered 311 to 323, inclusive, reflects that the

bill of lading portion of each of the exhibits contains the signature Santa Curro or S. Curro.

14. Defendant's Exhibits 5A contains no leads pointing to Midwest Scrap Metal Company and the Internal Revenue Service obtained no leads from the Federal Bureau of Investigation relative to Midwest Scrap Metal Company. (Tr. 534, Gov't Ex. #4; cf. Gov't Ex. #5, memo dated 10-10-63; Deft. Exhibit #1-3, 5-7).

15. The documents marked as Government's Exhibit for Identification numbered 311 to 323, inclusive, were obtained by the Government from one Mr. Leonard J. Kannenberg, a professional receiver, on July 23, 1963. (Tr. 263-269; Deft. Ex. for Id. #12).

In view of all the aforestated findings of fact, this Court further finds that the record contains sufficient evidence that the documents objected to above, or copies thereof, were not obtained by the Government through the execution of the search warrant subsequently held to have been invalid, as is charged by the defendant, for the reason that the Government's leads and follow-ups to those leads were obtained and developed independently of the execution of the aforementioned search warrant.

The Court has heard evidence on several occasions from the Government's witnesses, and especially takes note of the testimony of Schwalbach and Jackson. Jackson testified that he developed the leads from the postal covers and that he did not use the illegally seized property in developing these leads. Mr. Schwalbach also testified that the leads were not used from the illegally seized evidence. This raises a question of the credibility of witnesses. The Court has heard these witnesses testify in open court, and is of the opinion that their testimony is credible, that no perjury has been committed by either of these agents, and therefore that there is sufficient evidence in this record to justify a finding that the leads used in producing the ex-

hibits above mentioned were not tainted leads, but were leads that were procured elsewhere through the letter cover and not through the illegally seized evidence, and that the records of Altex Corporation did not flow from the seized copies of Midwest, but are an independent source of evidence which the Court in no instance has ever suppressed.

It Is Therefore Ordered that defendant, Frank Peter Balistrieri's aforementioned objections as to the admissibility of Government's Exhibits for identification numbered 311 to 323 inclusive, and as to the aforementioned testimony from Nila I. Jewett are hereby overruled. The exhibits and testimony are hereby admitted, subject however to defendant's standing objections as to materiality and relevancy.

Entered this 1st day of November, 1966.

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United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the trial court on a motion to suppress evidence (Pet. App. 18a–23a) is unreported. The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 403 F. 2d 472.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–17a) was entered on November 7, 1968, and a petition for rehearing was denied on December 31, 1968. By order of January 20, 1969, Mr. Justice Marshall extended the time for filing the petition for a writ of certiorari to February 19, 1969. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. (a) Whether the court of appeals used an improper standard in reaching the conclusion that the government evidence was free of taint.

(b) Whether the courts below were justified in finding that the lead to Midwest Scrap Iron Co. was justified.

2. Whether, by stating that petitioner was given the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree, the court of appeals improperly cast upon him a part of the burden of establishing lack of taint.

3. Whether petitioner's rights were infringed by the illegal electronic surveillance of one of his attorneys which terminated fifteen months before the indictment was returned and which the courts below found not to have tainted the government's case in any way.

4. Whether the government's proof was sufficient to establish that petitioner's excessive net worth increases arose from current taxable sources.

5. Whether, in view of the court's corrective instruction, the prosecutor's error in asking one defense witness whether he had ever been arrested or convicted of a felony was prejudicial to petitioner.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by

this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois petitioner was convicted of two counts of income tax evasion for the years 1959 and 1960, in violation of 26 U.S.C. 7201, and was sentenced to concurrent two-year prison terms and fines totalling $10,000.[1] The court of appeals affirmed.

The indictment alleged that the true taxable income and income tax of petitioner compared with the amounts he had reported on his returns was as follows (A. 43–45):[2]

Year	Taxable Income		Income Tax	
	Reported	Corrected	Reported	Corrected
1959	$5,355.00	$28,036.38	$1,098.10	$8,837.10
1960	5,220.00	36,868.90	1,068.40	12,860.52
Totals	10,575.00	64,905.28	2,166.50	21,397.62

It was established that during the year 1959 peti-

[1] The indictment had also charged petitioner and his bookkeeper, Jennie Alioto, with conspiring to obstruct the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. 371. Because the court found that the conspiracy count was tainted by illegal evidence, it compelled the government to elect to proceed only on the two tax evasion counts. (Pet. 4.)

[2] As in the petition for a writ of certiorari, "A." refers to the Defendant's Appendix, "E." refers to "Excerpts of the Transcript Relating to Electronic Eavesdropping", and "G.A." refers to the Government's Appendix.

tioner's net worth[3] increased by $25,423.01 and that during the same year he made non-deductible expenditures of $10,169.42, resulting in an adjusted gross income as reconstructed of $35,592.43 (Govt. Ex. 465), and a taxable income of $30,992.43 (Govt. Ex. 466), compared with $5,355.00 reported on petitioner's tax return (Govt. Ex. 6). (See G.A. 194–195.) During the year 1960 petitioner's net worth increased by $28,519.76 and he made non-deductible expenditures of $12,875.02, resulting in an adjusted gross income as reconstructed of $41,394.78 (Govt. Ex. 465), and a taxable income of $36,794.78 (Govt. Ex. 467), compared with $5,220.00 reported on petitioner's tax return (Govt. Ex. 467). (See G.A. 191–193, 196–197.)

The sources of income reported on petitioner's tax returns for the two prosecution years were Hotel Roosevelt, Inc., Ben-Kay, Inc. and the Para Corporation. In addition, as to the year 1960, Melody Lane, Inc. was shown as a source of reported income.

The government's evidence showed that in addition to these reported sources of income petitioner in both 1959 and 1960 had, as an undisclosed source of taxable income, an enterprise known as the Midwest Scrap Metal Co. which bought scrap metal from the Altex Corp. (G.A. 36–37, 149) and s ld it to A. Cohen & Sons Co. (Govt. Exs. 468 and 469). The government's reconstruction of petitioner's profit on these operations was embodied in Govt. Exs. 468 and 469,

[3] The foundation for the net worth computations was a net worth statement of petitioner and his wife filed with the Wisconsin Department of Taxation in March, 1954, showing their net worth as of December 31, 1953 (Govt. Ex. 12A).

which disclosed that petitioner's profit for 1959 was $3,071.45 (G.A. 198) and his profit for 1960 was $2,163.05 (G.A. 201–202). Although petitioner did not conduct this business under his own name there was evidence that he was the sole owner.

Attempting to account for the unreported income shown on the government's net worth summaries, the defense called a number of witnesses who testified that they had loaned or advanced money to petitioner during the prosecution years.

ARGUMENT

1. Petitioner's first contention (Pet. 13–17) is that the court below used an improper standard in reaching its conclusion that the evidence used against petitioner was free of taint. Petitioner says the burden was on the government to establish lack of taint by clear and convincing evidence, *United States* v. *Wade*, 388 U.S. 218, 240, and that the court below found merely "substantial evidence" (Pet. 8a) to that effect. Petitioner did not, however, urge that standard in the court of appeals.[4]

[4] In its main brief the defense argued merely that the government had failed to sustain its burden of proving lack of taint and that the record affirmatively showed taint. No suggestion was made as to the standard of proof. In its petition for rehearing the defense argued, erroneously, that the government's burden was to prove lack of taint beyond a reasonable doubt, citing *Chapman* v. *California*, 386 U.S. 18, 24. That case holds merely that if a defendant's constitutional rights are infringed during the course of a trial it is up to the prosecution to prove beyond a reasonable doubt to the appellate court that the error was harmless. Here there was no infringement during trial.

We agree that the proper standard is "clear and convincing evidence" and we submit that that standard was met in this case. The government, having admitted possession of tainted information relevant to the case at issue,[5] had the burden of convincing the trial court that its proffered evidence had an independent origin. *United States* v. *Wade,* 388 U.S. 218, 240; *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79, n. 18; *United States* v. *Coplon,* 185 F. 2d 629, 636 (C.A. 2), certiorari denied, 342 U.S. 920; *United States* v. *Goldstein,* 120 F. 2d 485, 488 (C.A. 2), affirmed, 316 U.S. 114. In discharging this burden the government:

(1) Affirmatively showed an independent source for the evidence used (G.A. 69–85, 98–103; E. 107–163; Govt. Motion Ex. 10).[6]

(2) Disclosed to the court and petitioner's counsel all information in the government's possession which was obtained as a result of the three electronic surveillances and the two searches and seizures (E. 9–25, 69–70, 75–77, 103, 188–191, 215–246; G.A. 45–59, 124–127, 251–254, 257–266).

(3) Actively assisted petitioner's counsel in ferret-

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[5] By disclosing these facts, in response to petitioner's motion, the government relieved the defense of any further burden under *Nardone* v. *United States,* 308 U.S. 338, 341, to establish that an illegal search occurred and that its fruits were used against him. Thus, the burden shifted to the government "to convince the trial court that its proof had an independent origin." *Ibid.*

[6] Govt. Motion Exhibit 10 shows the source of virtually all the government's evidence. Photostatic copies of that exhibit, together with Govt. Exs. 12A, 465 through 469, have been furnished to defense counsel and to the Clerk of this Court.

ing out possible taint by furnishing replies to all questions posed by counsel (E. 69–70, 75–76, 77, 81–91, 92–94, 103, 188–190; G.A. 45–51, 55–59, 60–62, 66–69, 86–97, 103–110, 124–125, 128–129, 248–260, 264–265, 273–275).

(4) Identified and made available for cross-examination all personnel and ex-personnel of the Federal Bureau of Investigation who participated in the three electronic surveillances (G.A. 97, 248–249).

The trial court ordered suppressed all information obtained as a result of the three electronic surveillances and the two searches and seizures and all leads developed therefrom (E. 182–187; G.A. 112–113). Additionally, the court compelled the government to elect to proceed to trial on the substantive counts, apparently recognizing that the conspiracy count might be tainted (E. 72; G.A. 266–269).

As for the source of the evidence concerning Midwest Scrap, the trial court held a hearing on this very matter and made specific findings of facts (E. 183–187) to the effect that a lead to Midwest Scrap was lawfully obtained by the Treasury agents prior to October, 1961, *i.e.,* prior to the searches and seizures and to the electronic surveillances, and that that lead was developed to its ultimate conclusion independently of, although subsequent to, the acquisition of the admittedly tainted leads. The suppression of evidence rule does not extend to facts which are obtained from a source completely free of taint merely because the same facts were obtained from another source concededly illegal. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392; *Nardone* v. *United States,*

308 U.S. 338, 341; *United States* v. *Nardone,* 127 F. 2d 521, 523 (C.A. 2), certiorari denied, 316 U.S. 698. The court of appeals found (Pet. 5a) that the trial court was right in holding that "the Midwest leads were obtained independently of the searches."

We submit that the government established by clear and convincing evidence that its trial evidence was untainted, and that the court of appeals would have had no hesitancy in so holding had petitioner called to its attention the correct formulation of the rule as to quantum of proof.

Moreover the confusion petitioner professes to find (Pet. 13–14) among the circuits does not exist. The correct rule is that where constitutional taint may have infected a trial the government has the burden of showing by clear and convincing evidence that the trial was not so infected. *United States* v. *Wade,* 388 U.S. 218, 240.[7] It is true that in two circuits, the District of Columbia and the Fourth, there is a special "reasonable doubt" rule for the guidance of trial courts, but that seems to have been limited to situations of confessions alleged to have been coerced. *Pea*

[7] Petitioner cites only one case (Pet. 13, n. 5) for the proposition that the District of Columbia Circuit has held that a preponderance of the evidence is sufficient, *Clifton* v. *United States*, 371 F. 2d 354, 358–359, certiorari denied, 386 U.S. 995, but that case has admittedly been overruled by the same court in a later case, *Pea* v. *United States*, 397 F. 2d 627 (*en banc*). Moreover *Clifton* v. *United States*, does not mention the word preponderance but merely says that "the confession should not be admitted in evidence unless the trial judge makes a preliminary determination and an express finding that on all the evidence he is satisfied that the confession was voluntarily made." (371 F. 2d at 359–360.)

v. *United States,* 397 F. 2d 627, 637–638 (C.A. D.C.); *Mullins* v. *United States,* 382 F. 2d 258 (C.A. 4); *United States* v. *Inman,* 352 F. 2d 954 (C.A. 4).[8]

2. The court of appeals did not cast upon the petitioner a part of the burden of establishing lack of taint when it stated that he was given "the opportunity to show that a substantial portion of the case against him was the fruit of the poisonous tree * * *" (Pet. App. 8a). As we have shown, *supra,* pp. 6–8, the government fully sustained its burden of establishing lack of taint. There is no validity in petitioner's theory (Pet. 17–19) that the source of the language just quoted, *Nardone* v. *United States,* 308 U.S. 338, 341, has been stripped of vitality by more recent authorities. Only recently, in *Alderman* v. *United States,* No. 133, this Term, decided March 10, 1969 (slip op., p. 17), this Court expressly reaffirmed the *Nardone* rule, stating that while the "ultimate burden" of proof is upon the government, "* * * * at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint."

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[8] We disagree with petitioner's statement (Pet. 15) that the "chasm between substantial evidence and clear and convincing evidence is wide." In *United States* v. *Feinberg,* 140 F. 2d 592, 594 (C.A. 2), certiorari denied, 322 U.S. 726, Judge Learned Hand stated: "We agree with Judge Amidon in Hays v. United States, supra, 231 F. 106, who refused to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use." Of course the line between substantial evidence and clear and convincing evidence is even thinner.

3. The court below properly determined that petitioner's right to counsel was not so infringed by an electronic surveillance of one of his attorneys, Dominic Frinzi, that the indictment should be dismissed. This surveillance had terminated long before the indictment in the present case was returned and a full disclosure of the incident was made at the trial.

Disclosure of the surveillance of Frinzi, which had terminated on October 2, 1963 (E. 189, 234), was made to the trial judge on October 17, 1966, before the trial started, because petitioner's name had been mentioned in some of the intercepted conversations (E. 10). The records relating to the surveillance were not immediately made available to defense counsel, but were impounded and sealed by the trial judge (E. 21). Although Frinzi was one of the attorneys of record for petitioner, no one on the government's side appears to have been aware of that fact in the early days of the trial.[9] On November 3, 1966, one-third of the way through the trial, and in response to a question from the defense, the disclosure of the surveillance of Frinzi was made to the defense (E. 188–189; G.A. 95–97), and all the available materials relating to it were turned over to defense counsel (E. 194).

The purpose of the surveillance of Frinzi was not, as petitioner implies (Pet. 21), to interfere with his right to counsel. It was not directed against petitioner at all, but had been "placed on Frinzi because of his

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[9] Frinzi, who had never previously appeared at the trial or at the pre-trial suppression hearings, showed up in court on November 4, 1966, and was present through the remainder of the trial.

association with prominent Milwaukee hoodlums and in an effort to develop information bearing upon [a] gangland murder * * * " (G.A. 276; cf. G.A. 252–254). All information in the government's possession obtained as a result of this surveillance was turned over to petitioner and the names of the monitors were disclosed to him (G.A. 248–251, 276–278). Other than a very limited cross-examination of one FBI agent (E. 234–237, 240, 244), petitioner never availed himself of the opportunity to cross-examine these monitors. In view of this, we do not understand petitioner's statements (Pet. 22) that "[t]he documents necessary to show what was overheard are conspicuously absent", and "[t]he miscreant officers say they overheard no secrets."

The court below held that, "As with the other electronic eavesdropping, the Government proved its evidence was free from any taint as a result of this illegal surveillance" (Pet. App. 9a), and that it found "nothing in the record supporting the allegation that the purpose of conducting the surveillance was to interfere with defendant's right to counsel, nor does it appear that such right was infringed as the result of the Government's conduct" (*id.*).

Petitioner's argument (Pet. 21–23) that the proper remedy is dismissal of his case, if adopted, would mean that in every case where an attorney has been the subject of an electronic surveillance all of his clients would receive immunity from criminal prosecution, even where, as here, the surveillance terminated fifteen months before the indictment was returned. This is not the law. Petitioner was entitled

to an adversary proceeding as to the effect of the intrusion, and that is exactly what he has already received in the district court (Pet. App. 9a).

4. There is no merit in the argument (Pet. 23–26) that the government erred in pointing to Hotel Roosevelt, Inc. and Ben-Kay, Inc. as "likely sources" of unreported income. What this boils down to, of course, is a contention that the government did not establish that the unreported income arose from current taxable sources. *Holland* v. *United States,* 348 U.S. 121, 138.

To begin with, proof of a likely source is not indispensable; on the contrary, should all possible sources of non-taxable income be negatived, there is no necessity for proof of a likely source. *United States* v. *Massei,* 355 U.S. 595. Here, petitioner was given credit for all borrowings (Govt. Ex. 465). There was ample proof, from the lack of gift tax returns in the files of both the federal and state governments (G.A. 116–124), that the increases did not arise from gifts. There was no suggestion, either in the government's proof or that of petitioner that he had inherited any money. There was evidence that petitioner had received, in 1958, $2,087 as proceeds from a life insurance policy and he was duly given credit for that (Govt. Ex. 465). This left only taxable sources.

Moreover, the government established three likely sources of income: Midwest Scrap, which has been discussed (*supra,* pp. 4–5); and the two other enterprises of which petitioner was the president and active operator during the prosecution years (G.A. 148–149;

Tr. 1249). The jury could readily infer that most of the excessive net worth increases and expenditures arose from funds syphoned off from these businesses by petitioner. *United States* v. *Mackey,* 345 F. 2d 499, 506–507 (C.A. 7), certiorari denied, 382 U.S. 824; *Gleckman* v. *United States,* 80 F. 2d 394, 399 (C.A. 8), certiorari denied, 297 U.S. 709. Of course the government was not required to prove such syphoning off by direct evidence. If it could do that there would be no need to introduce the voluminous net worth proof. Cf. *Armstrong* v. *United States,* 327 F. 2d 189, 194 (C.A. 9).

5. The prosecutor's error in asking defense witness Klein whether he had ever been arrested or convicted of a felony (Pet. 12–13, 26–28) did not prejudice petitioner. Error which could not have affected the result of the trial is deemed not to be prejudicial and of no consequence, *Homan* v. *United States,* 279 F. 2d 767, 771–772 (C.A. 8), even where it occurs during the cross-examination of a defendant himself, *Salerno* v. *United States,* 61 F. 2d 419, 424 (C.A. 8). Klein's testimony, even if believed, could have had no possible effect on the 1959 count and only a minor effect on the 1960 count—reducing the unreported taxable income from $31,574.78 to $26,574.78. Since it is, of course, unnecessary for the government to prove the exact amount of unreported income alleged in the indictment, the relatively minor impact of Klein's testimony should not result in a reversal with respect to either count. Moreover, the defense was perfectly free to call to the jury's attention the fact

that Klein had a clean record but chose not to do so. The prosecutor's error was only a minor lapse in a long trial, which the court promptly instructed the jury to disregard, and which could not have affected the verdict.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As to Question One

This prosecution followed FBI and IRS investigations closely coordinated by the Organized Crime Division of the Department of Justice. Despite the fact that both agencies employed illegalities in their investiga-

tions and that information flowed freely between them, the government claims to have demonstrated that certain IRS agents, thoroughly blinded to anything going on about them, prepared the prosecution independently of the illegalities. We submit that the acceptability of the government's claim depends on a comparatively low standard of proof. And the court below used the lowest standard defined by the law—substantial evidence.

The government now concedes that the standard employed was too low,[1] but argues that the same result would have followed from use of the proper standard—clear and convincing evidence. We submit that the government cannot possibly know the outcome of a fair judgment which has not yet been made. Remand, not speculation, is the way to determine that question.

The government's suggestion that the different legal formulations of proof standards really do not define

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[1] The government incorrectly asserts that petitioner failed to raise the standards issue below. (Brief in Opposition, 5) In his petition for rehearing, denied without opinion, petitioner directly challenged the substantial evidence standard employed by the court. In support of his position, he relied on both *Chapman* v. *California*, 386 U.S. 18 (1967) and *United States* v. *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968). The government states that reliance on *Chapman* and a reasonable doubt standard on dissipation of taint was erroneous, in that the *Chapman* standard applies only to trial errors violative of constitutional rights. However, courts have applied the "harmless error"-reasonable doubt burden to dissipation of taint generally. *People* v. *Johnson*, 4 Cr. L. 3153, 3156-57 (Cal. Sup. Ct., March 3, 1969), citing *People* v. *Spencer*, 66 Cal. 2d 158, 168, 424 P. 2d 715, 722 (1967). See, *Harrison* v. *United States*, 392 U.S. 219, 225 n. 12 (1968). Moreover, in *Schipani*, Judge Weinstein discusses in depth the full range of standards against which dissipation of taint has been measured. 289 F. Supp. at 54-59.

different burdens is patently wrong.[2] The judicial energy spent carving out these standards has not been "much ado about nothing." The instant case exemplifies the importance of the difference between standards. The proposition to be established—that the evidence of the Midwest-Altex relationship, revealed by the illegal search and seizure, was not a product of that seizure, but rather of mail cover leads which (a) did not reveal the interrelationship and (b) lay unexploited for fourteen months until after the illegal seizure—was at least dubious. We suggest that, as to such a proposition, it makes a crucial difference whether the government is to be held to a "clear and convincing" standard or let off with a "substantial evidence" standard.

As to Question Three

Petitioner seeks dismissal of this prosecution on the grounds that the government deliberately intruded into the confidentiality of his relationship with his attorney. The government responds that to adopt petitioner's argument "would mean that in every case where an attorney has been the subject of an electronic surveillance all of his clients would receive immunity from criminal prosecution, even where, as here, the surveillance terminated fifteen months before the in-

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[2] Similarly incorrect is the statement that no conflict exists as to the weight of the burden the government bears to convince a court that its evidence was not obtained in violation of a defendant's constitutional rights. (Brief in Opposition, 8-9) The difference of opinion as to whether proof beyond a reasonable doubt, clear and convincing evidence or some other standard is proper has neither been limited to two circuits nor to the question of coerced confessions. (See authorities cited in the Petition, 14 n. 7.) Indeed, no valid reason exists why one rule should exist for coerced confession cases and another for different constitutional violations. See, *United States* v. *Schipani*, 289 F. Supp. at 58-59.

dictment was returned." (Brief in Opposition, 11) This sweeping assertion misstates the factual and legal issues presented by the petition. The subject of this electronic surveillance was not the attorney but a certain group of his clients among which the government counted the petitioner.[3] Moreover, the government must have known that during the period the bug was operative, the attorney represented petitioner in his tax affairs which were then the subject of investigation and now of prosecution. (Petition, 7-9) Given this type of callous disregard for the right to counsel, the only effective remedy is dismissal. What disposition should be made of prosecutions whose subject matter was not the subject of the attorney-client relationship during the period of the electronic eavesdropping is a question which can be left for other cases.

As to Question Four

The government responds that the petitioner's net worth argument would require the government to establish by direct evidence the siphoning off of funds. (Brief in Opposition, 13) Petitioner takes no such position. The government fails to respond to the position petitioner does take: that there must be proof that the corporations cited as likely sources are capable of producing the additional income or that their business methods are such as to provide the opportunity to siphon out undetectable income. Absent proof of this

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[3] The FBI memorandum concerning the bug on petitioner's attorney relates that it was aimed at that attorney's "Milwaukee hoodlum" connections. (Petition, 8) An earlier memorandum from the FBI dated October 10, 1966, and also concerning electronic surveillance in this case, referred to petitioner as "a Milwaukee hoodlum." (G.A. 252-53)

nature, present in this Court's other net worth decisions, these corporations are not likely sources which the jury could reasonably infer produced the increases in net worth.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner, Frank P. Balistrieri, on the basis of the intervening circumstances hereinafter set forth, prays for rehearing of the Court's order of April 21, 1969, denying his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioner's counsel are also counsel for one Felix Antonio Alderisio, whose conviction this Court remanded, in *Alderman* v. *United States,* No. 133, October Term 1967, for a hearing in the United States

District Court for the District of Colorado on the effect of certain electronic eavesdropping which the Solicitor General admitted had been conducted against Alderisio. The time and place of the said electronic eavesdropping, which had not been specified by the Solicitor General in his admission to this Court, were to be determined in the hearing on remand. However, through the testimony of FBI Special Agent August C. Kempff in an unrelated case, *United States* v. *Joseph Y. Stein and Leonard P. Stallman,* No. 2523—Crim., United States District Court for the Central District of California, it had come to counsel's attention that the bugging of Alderisio included an illegal electronic surveillance conducted in certain premises at 645 North Michigan Avenue, Chicago, Illinois, from approximately October of 1964 to approximately April of 1965.

2. After the denial of the petition for a writ of certiorari herein, counsel met with their other client, Alderisio, to begin preparations for the hearing on remand of his case. In the course of preparation, counsel learned from Alderisio that this petitioner, Balistrieri, had been a frequent visitor in the bugged premises at 645 North Michigan Avenue during the period of the bugging and had then and there frequently conversed with Alderisio and others. In an attempt to verify this information, counsel communicated with Messrs. Simon, Sheridan, Murphy, Thorton and Medvene, of Los Angeles, California, counsel for the defendants in the case in the Central District of California, to whom the government had supplied copies of the logs of the North Michigan Avenue bugging. They stated, however, that, by virtue of a protective order sought and obtained by the government

in that case, they were forbidden to disclose to us any of the contents of the logs.

3. The government, while it disclosed to petitioner Balistrieri the three buggings referred to in his petition for certiorari, never disclosed to him the North Michigan Avenue bugging. The Solicitor General, had he been aware of a fourth bugging at the time he filed the opposition to the petition for certiorari, would certainly have disclosed it to this Court. We assume, therefore, that, if petitioner was in fact overheard over the North Michigan Avenue bug, the Solicitor General was unaware of it.

CONCLUSION

Under the circumstances, we submit, it would be appropriate for the Court (1) to call upon the Solicitor General to file a response to this petition and, if the said response confirms the fact that petitioner was convicted without disclosure to him of all the instances in which he had been bugged, (2) to vacate the order denying the petition for certiorari, and (3) to issue the writ of certiorari and take such other and further action as it may deem proper.

Respectfully submitted,

EDWARD BENNETT WILLIAMS

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

HAROLD UNGAR
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1070

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

This memorandum is submitted pursuant to the order of this Court of May 26, 1969, requesting the Solicitor General to file a response to the petition for rehearing.

On receipt of the petition for rehearing in this case, we caused a further investigation to be made concerning possible electronic surveillance affecting petitioner. We have been advised that petitioner Balistrieri was overheard during the course of an electronic surveillance of the premises at 645 North Michigan Avenue. We were not aware of this overhearing at the time the government's brief in opposition to the petition for writ of certiorari was filed.

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In these circumstances, we believe that it would be appropriate for the Court to vacate the order denying certiorari, grant the petition, vacate the judgment below and remand the case to the district court for further proceedings.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1969.

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